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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1178

ALPHONSE INDELICATO,

Petitioner,

against

THE NEW YORK STATE BOARD OF PAROLE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
The Prior Proceedings	2
The Instant Petition	5
Jurisdiction	6
Statement of the Case	6
Argument	10
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Berenyi v. Immigration Director, 385 U.S. 630 (1967)	10
Brady v. Maryland, 373 U.S. 83 (1963)	10
Giglio v. United States, 405 U.S. 150 (1972)	10
Indelicato v. State of New York, 375 U.S. 844 (1963)	3
Indelicato v. Warden of Greenhaven Prison (S.D. N.Y. 1964)	4
Indelicato v. Warden, 379 U.S. 936 (1964)	4
People v. DiBiasi, 7 N.Y. 2d 544 (1960)	2 n. 1
People v. Indelicato, 13 A.D. 2d 631 (1st Dept. 1961)	3
People v. Indelicato, 12 N.Y. 2d 795 (1962)	3
United States ex rel. Indelicato v. New York State Board of Parole (S.D.N.Y. 1975)	5
United States v. Johnson, 268 U.S. 220 (1925)	10

Other Authority:

United States Code 28 U.S.C. §1254(1)	5

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Preliminary Statement

Alphonse Indelicato, a convicted murderer currently on parole from a New York State prison, is seeking a writ of certiorari to review the final order of the United States Court of Appeals for the Second Circuit (MOORE, FEINBERG, OAKES, JJ.), entered December 11, 1975. That court denied his application for a certificate of probable cause affording leave to appeal the order of the United States District Court, Southern District of New York, denying habeas cor-

pus relief (GRIESA, J.). In his application for a writ of habeas corpus Indelicato contended that his right to a fair trial was violated because, so he alleged, the prosecutor at his state trial withheld evidence and knowingly condoned perjurious testimony by a prosecution witness.

The Prior Proceedings

An indictment filed in New York County charged that Alphonse Indelicato, Carmine DiBiasi* and another, on December 26, 1951, shot and killed Michael Errichiello and attempted to kill one Rocco Tisi. Indictment No. 239½-52. Indelicato was tried twice. The jury was unable to agree on a verdict at the first trial. Following a second jury trial in the Court of General Sessions (HAROLD A. STEVENS, J.), Indelicato was convicted of MURDER IN THE SECOND DEGREE and ATTEMPTED MURDER IN THE FIRST DEGREE and on June 30, 1954, was sentenced to concurrent terms of imprisonment of from 20 years to life and from 12 and one half years to 25 years.

Indelicato appealed his conviction to the Appellate Division of the Supreme Court of the State of New York, First Judicial Department. He alleged that, (1) his guilt was not established beyond a reasonable doubt, (2) the trial court committed prejudicial errors in ruling on testimony relating to his identification, and in refusing to allow full cross-examination of the principal prosecution witness,

* DiBiasi was not arrested until four years after the trials of Indelicato. He was tried and convicted of murder in the first degree, but that conviction was reversed by the Court of Appeals of the State of New York. 7 N.Y. 2d 544 (1960). DiBiasi was acquitted upon a retrial.

(3) the remarks of the prosecutor during summation prejudiced his right to a fair trial, and (4) his home was illegally searched, and his coat was illegally seized.

While his appeal was pending before the Appellate Division, an application for a writ of error *coram nobis* was filed with Justice GERALD P. CULKIN of the Supreme Court [the successor of the Court of General Sessions] alleging that the prosecution knowingly suppressed material and relevant evidence and permitted perjurious testimony.* A hearing was held and on June 16, 1960, Justice Culkin denied the motion. A reargument was subsequently granted, and after reargument, the motion was again denied by Justice Culkin on January 17, 1961.

On April 13, 1961, the Appellate Division unanimously affirmed, without opinion, both Indelicato's conviction and the order of Mr. Justice Culkin denying his application for a writ of error *coram nobis*. *People* v. *Indelicato*, 13 A.D. 2d 631 (1st Dept. 1961).

Thereafter, leave was granted Indelicato to appeal to the New York State Court of Appeals. On December 6, 1962, that court unanimously affirmed, without opinion, the Appellate Division orders affirming Indelicato's judgment of conviction and the denial of his application for a writ of error *coram nobis*. *People* v. *Indelicato*, 12 N.Y.2d 795 (1962).

On October 14, 1963, the United States Supreme Court denied Indelicato's petition for a writ of certiorari. *Indelicato* v. *State of New York*, 375 U.S. 844 (1963).

* The prosecutorial misconduct alleged in that *coram nobis* proceeding is unrelated to the claims which are the subject of this petition.

An application for federal habeas corpus relief, on the grounds that the prosecutor had suppressed exculpatory evidence necessary to the defense* and that Indelicato had been the target of an illegal search, was denied by Judge EDMUND L. PALMIERI of the United States District Court, Southern District of New York on April 2, 1964. *Indelicato* v. *Warden of Greenhaven Prison,* 64 Civ. 43 (S.D.N.Y. 1964) (not reported). An application for a certificate of probable cause was denied by the United States Court of Appeals for the Second Circuit (LUMBARD, MOORE and SMITH, JJ.), on May 4, 1964. Thereafter the United States Supreme Court denied certiorari on a petition to review that proceeding. *Indelicato* v. *Warden,* 379 U.S. 936 (1964).

In 1973 Indelicato applied to the Supreme Court, New York County, for a writ of error *coram nobis* contending that the prosecutor at his trial had knowingly condoned perjury by the state's principal witness. On April 9, 1974, after a full evidentiary hearing, Justice JOSEPH MARTINIS of that court denied the application. (The decision of Justice Martinis denying the application is annexed to the Appendix of Indelicato's petition for certiorari at pages 36-42.) Leave to appeal that decision to the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, was denied on May 28, 1974 (NUNEZ, J.). Under New York law, no further appeal to the state courts was possible.

Indelicato then petitioned for a writ of habeas corpus in the United States District Court, Southern District of

* The allegations of prosecutorial misconduct in this habeas corpus petition were the same claims that were aired before Justice Culkin in the prior *coram nobis* proceeding, and are unrelated to the claims in the instant petition.

New York, essentially restating the claims made in the application for state *coram nobis* relief. He sought release from the supervision of the New York State Parole Board. On July 28, 1975 Judge Griesa denied both Indelicato's application for habeas corpus relief and his further request for a certificate of probable cause. *United States ex rel. Indelicato* v. *New Yrok State Board of Parole,* 74 Civ. 4964 (S.D.N.Y. 1975) (not reported). (The decision of Judge GRIESA denying the application is annexed to the Appendix of Indelicato's petition for certiorari at pages 32-35.)

On September 23, 1975, the United States Court of Appeals for the Second Circuit (MOORE, FEINBERG, OAKES, JJ.), denied Indelicato's petition for a certificate of probable cause. On December 11, 1975, that Court (MOORE, FEINBERG, OAKES, JJ.) denied Indelicato's motion for reconsideration of its September 23, 1975 order denying a certificate of probable cause.*

The Instant Petition

Indelicato asks this Court to grant a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit. He claims that his right to a fair trial under the Fourteenth Amendment to the United States Constitution was violated because he alleges the prosecutor suppressed exculpatory evidence and because he condoned perjury of his principal witness at trial.

* On November 28, 1975, Mr. Justice Thurgood Marshall granted petitioner an enlargement of time in which to file his petition for certiorari, until February 20, 1976.

Jurisdiction

Indelicato invokes jurisdiction of this Court pursuant to 28 U.S.C. §1254(1).

Statement of the Case

The evidence at trial showed that on Christmas night, 1951, Michael Errichiello was shot to death while he was asleep inside the Mayfair Social Club on Mulberry Street in New York City. Rocco Tisi was present in the club at the time of the shooting and was an intended victim of the three men who murdered Errichiello. Tisi subsequently identified Indelicato and Carmine DiBiasi as two of the men who slayed Errichiello. Both Indelicato and DiBiasi were previously known to Tisi. Tisi, a bar owner, was placed in protective custody by the Manhattan District Attorney's Office and was the chief witness against Indelicato.

In the period between Indelicato's first and second trials, Tisi received a notification from the New York State Liquor Authority (hereinafter S.L.A.) stating that his liquor license would not be renewed because when he originally applied for that license he failed to disclose that he was twice previously arrested for crimes the S.L.A. required to be reported. Tisi immediately phoned prosecutor Vincent Dermody and told him of the letter from the S.L.A. Dermody said that he would call the S.L.A. and "find out what it was all about" (688).* Through Dermody's intercession, the S.L.A. thereupon agreed to stay the cancellation of Tisi's liquor license. This agreement was evidenced by a stipulation, signed by Tisi and an S.L.A. representative, providing that Tisi's license would be renewed because the district attorney's office requested that all action be deferred to a later date. This stipulation was obtained by Indelicato's trial counsel when he subpoenaed Tisi's S.L.A. file, but was never introduced into evidence because it contained information as to Tisi's prior arrests. At trial, Tisi was questioned as to whether Dermody intervened on his behalf with the S.L.A. and answered that Dermody "must have" (671-672). However, Tisi stated that he did not know exactly what Dermody did (672-675).

* Parenthetical numerical references are to the minutes of Indelicato's second trial.

In his *coram nobis* petition Indelicato claimed that Tisi testified falsely at trial as to the facts surrounding Dermody's intervention with the S.L.A. In essence Indelicato claimed that Tisi knew precisely what Dermody did because Tisi was present in Dermody's office when he called the S.L.A. Indelicato further contended that Dermody knew that Tisi was perjuring himself.

A full evidentiary hearing was conducted in Manhattan Supreme Court before Justice Martinis to air this claim. Tisi testified that he was present when Dermody phoned the S.L.A. and heard him ask the person on the phone to put a hold on the matter until he, Dermody, called again (H 15-17). However, Tisi said that he lied at trial because Dermody told him to "keep it confidential" (H 15-18, 64-67).* Dermody testified that he was unable, twenty years later, to remember if Tisi was actually present

* Parenthetical numerical references preceded by "H" are to the minutes of the *coram nobis* proceeding.

in his office when he phoned the S.L.A. (H 202). However, he did recall that he never told Tisi to keep his intervention confidential (H 79, 202-203, 208). Justice Martinis found Tisi an incredible witness:

> In making its findings and conclusions, the court has very carefully observed the witness and scrutinized the testimony on the record. The response to questions by both sides and his often volunteered remarks at the hearing reveals a pathetic figure of a man whose life was literally broken up by the incident of being called as a state's witness in four cases by the same prosecutor, by being kept in protective custody for a period of ten years, and recently by being again called by the same prosecutor's office in regard to some other information unrelated to this hearing. For his misfortune he blames the state and its prosecutor. He is not a well man, suffering from various medical disorders, and his sensitivity threshold appears to be very weak. His inclination to please both sides, while favoring the defendant, is obvious; and his inability to recall certain events further weakens his credibility. The totality of all these circumstances and facts adduced from his testimony puts into question his motivation and therefore his veracity. Appendix to petition, at pp. 39-40.

Accordingly, Judge Martinis concluded that there had been no showing that Tisi in fact knew of all the details of Dermody's intervention with the S.L.A. Therefore, there was no showing that Tisi lied at trial, and no showing that the prosecution condoned perjury.

Indelicato also claimed that the prosecutor suppressed an "internal memorandum",* concerning Dermody's in-

* This document was read into the record at the *coram nobis* hearing at H 118-120.

tervention on Tisi's behalf, contained in the S.L.A. file. This document was discovered when the District Attorney re-subpoenaed the S.L.A. file in response to the *coram nobis* petition, and was turned over to Indelicato's attorney.

At trial, Indelicato's counsel had the stipulation* between Tisi and the S.L.A. concerning the proposed renewal of Tisi's liquor license. There was a reference in the stipulation to the fact that the district attorney's office had interceded to halt temporarily the suspension of Tisi's license. The internal memorandum signed by S.L.A. Deputy Commissioner Michael Mons, did not contain any additional information as to Dermody's intervention. It stated the fact that Dermody intervened on Tisi's behalf and gave specifics as to the names of the people spoken to at S.L.A. and the times of these conversations. Indelicato complained that this "exculpatory" internal memorandum had not been given to him before trial, and that, therefore, he was deprived of effective means of cross-examining Tisi.

Justice Martinis found that the whole issue of how the prosecutor intervened in Tisi's behalf was "a minuscule issue of recent occurrence at the time the trial took place." In any event, Justice Martinis found, "the issue of the prosecutor's intervention was already known to the defense counsel," and he had a copy of "the S.L.A. stipulation, which properly redacted could have been offered into evidence." Appendix to petition at pp. 40-41.

In his federal habeas corpus petition, Indelicato repeated these claims. Judge Griesa reviewed the trial rec-

* This document was read into the record at the *coram nobis* hearing at H 19-25.

ord and the record of the *coram nobis* proceeding. He found that Indelicato was afforded a full and fair hearing in the state court. (Petitioner does not now claim that he was entitled to a hearing in federal court.) Judge Griesa held that the findings of fact were fully supported in the record. In essence he found that there had been no showing of perjury at Indelicato's trial, and that Indelicato "had not suffered the claimed deprivation of his constitutional rights." Appendix to Petition, at p. 35. As to the alleged suppression of the "internal memorandum," Judge Griesa agreed with Justice Martinis that the defense knew of Dermody's intervention at the time of trial, and that it "had no bearing on what [Tisi] saw on the night of the murder." Appendix to Petition, at p. 34.

Argument

There is no dispute about the legal principles to be applied in deciding Indelicato's claim. If the prosecution knowingly allows a witness to commit perjury or if the prosecutor knowingly suppresses evidence, there is a denial of due process of law. *Giglio* v. *United States*, 405 U.S. 150, 153 (1972); *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963).

The question here is whether the prosecution did either of these two things. Thus, petitioners claim raises only factual questions resolved against him in a full and fair hearing in state court. That factual determination was reviewed and ratified by federal district court. The Court of Appeals decided that further review was not warranted by that court. Further review is certainly not warranted by this Court. See *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967); *United States* v. *Johnson*, 268 U.S. 220, 227 (1925).

Conclusion

The petition should be denied.

Respectfully submitted,

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